Supreme Court, U.S.
FILED

00 1475 MAR 19 2001

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

GLASS ENTERPRISES, INC.,

Petitioner,

v.

ARSENAL, INC., d/b/a ARSENAL ASSOCIATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. MCCANEY, JR., ESQ.
Counsel of Record
FLAMM, BOROFF & BACINE, P.C.
Attorneys for Petitioner
925 Harvest Drive, Suite 220
Blue Bell, PA 19422
(215) 239-6000

Wright Appellate Services 0311
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

60 pp

QUESTION PRESENTED

Where judgment is entered by confession, can a debtor be denied its post seizure due process hearing because the judgment creditor appropriated the debtor's property through garnishment during the pendency of a petition to open the judgment, and precluded the debtor from challenging the judgment by the unilateral act of having the judgment satisfied?

PARTIES TO THE PROCEEDING

Petitioner, Glass Enterprises, Inc. is a Pennsylvania corporation, has no parent corporation, and is not a publicly held company. Respondent, Arsenal, Inc. is a Pennsylvania corporation which does business as Arsenal Associates.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions Involved 1

Statement Of The Case 2

A. Pennsylvania's Confession of Judgment Procedure 2

B. Proceedings Below 6

Reasons For Granting The Petition 8

I. The Decision Of The Superior Court Of Pennsylvania Is Erroneous And Conflicts With Relevant Decision Of This Court 8

II. The Question Presented Is Important 11

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Continential Bank v. Frank, 495 A.2d 565 (Pa. Super. 1985) 4, 5

Franklin Decorators, Inc. v. Kalson, 431 A.2d 356 (Pa. Super. 1981) 3

Jordan v. Berman, 758 F. Supp. 269 (E.D. Pa. 1991), *affirmed in part, vacated in part* 20 F.3d 1250 (3d Cir. 1994) 7

Jordan v. Fox, Rothschild, O'Brien and Frankel, 20 F.3d 1250 (3d Cir. 1994) 2, 3, 4, 5, 7

Mitchell v. W.T. Grant Company, 416 U.S. 600, 94 S. Ct. 1895, 1900 40 L.Ed. 406 (1974) 9, 10, 11

North Georgia Fishing, Inc. v. DiChem, Inc., 416 U.S. 601, 95 S. Ct. 719, 42 L.Ed. 2d 751 (1975) 9, 10, 11

Statutes:

28 U.S.C. § 1257(a) 1

Rules:

Pa. R. Civ. P. 236 2

Pa. R. Civ. P. 2951 2

Pa. R. Civ. P. 2952 2

Pa. R. Civ. P. 2955 2
Pa. R. Civ. P. 2956 2
Pa. R. Civ. P. 2956.1 3
Pa. R. Civ. P. 2957 3
Pa. R .Civ. P. 2958.1 6
Pa. R. Civ. P. 2959 3
Pa. R. Civ. P. 2959 (a) 5
Pa. R. Civ. P. 2959 (b) 3, 4
Pa. R. Civ. P. 2959 (c) 5
Pa. R. Civ. P. 2959 (e) 3, 4, 5
Pa. R. Civ. P. 2959 (f) 4
Pa. R. Civ. P. 2960 5
Pa. R. Civ. P. 3103 3
Pa. R. Civ. P. 3108 3
Pa. R. Civ. P. 3111 3
Pa. R. Civ. P. 3111 (b) 3
Pa. R. Civ. P. 3111 (c) 3
Pa. R. Civ. P. 3111 (d) 3
Pa. R. Civ. P. 3121 (b)(2) 4
Pa. R. Civ. P. 3140 (a) 3
Pa. R. Civ. P. 3143 (b)(1) 4

APPENDIX

Appendix A – Order In The Supreme Court of Pennsylvania, Middle District, dated December 19, 2000 ..... 1a

Appendix B – Order In The Superior Court Of Pennsylvania, Eastern District, dated June 26, 2000 ..... 2a

Appendix C – Memorandum In The Superior Court Of Pennsylvania, Eastern District, filed April 20, 2000 ..... 3a

Appendix D – Opinion In The Court of Common Pleas Of Bucks County, Pennsylvania Civil Division, dated March 5, 1999 ..... 11a

Appendix E – Pennsylvania Rules of Civil Procedure 18a

Appendix F – Excerpts From Petition For Allowance of Appeal To The Supreme Court Of Pennsylvania, filed July 14, 2000 ..... 38a

Appendix G- Excerpts From Brief For Appellant Before The Superior Court Of Pennsylvania, filed May 14, 1999 ..... 39a

Glass Enterprises, Inc., a Pennsylvania corporation, respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania is not reported, it is set forth at App. 3a. The Opinion of the Court of Common Pleas of Bucks County, Pennsylvania is not reported, it is set forth at App. 11a.

STATEMENT OF JURISDICTION

The Superior Court of Pennsylvania entered its judgment on April 20, 2000 (App. 3a), and Application for Reargument was denied June 26, 2000 (App 2a.). The Supreme Court of Pennsylvania entered its Order denying Petition for Allowance of Appeal on December 19, 2000 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The issue presented by Petitioner Glass Enterprises, Inc. relies upon the Fourteenth Amendment of the Constitution of the United States, Section 1, which reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Pennsylvania's Confession of Judgment Procedure

Pennsylvania law authorizes a Prothonotary[1] of any of its Courts of Common Pleas to enter judgment by confession when a Plaintiff files a complaint that includes an original or a verified copy of an instrument the defendant has signed authorizing judgment by confession, an averment of default under that instrument's terms, and an actual confession of judgment signed by an attorney acting for the defendant. Pa. R.Civ.P. 2951 (App. 18a), 2952 (App. 20a), 2955 (App. 22a), 2956 (App. 22a). After the Prothonotary performs the ministerial act of entering judgment on confession, he is required immediately to notify the defendant he has done so. Pa. R.Civ.P. 236.

Once the Prothonotary enters a confessed of judgment, the plaintiff can secure a writ of execution by filing with the Prothonotary a formal request on a form called a praecipe for writ of execution, conditioned upon service of the notice on the defendant of the judgment at least thirty days prior to the filing of the praecipe for the writ of execution. Pa. R.Civ.P.

---

[1] In Pennsylvania, the Court of Common Pleas is the initial court of record. It is also a court of general jurisdiction. The Prothonotary functions as its clerk but has no judicial function. *Jordan v. Fox, Rothschild, O'Brien and Frankel*, 20 F.3d 1250, 1262 n. 12 (3d Cir. 1994).

2956.1 (App. 22a), 2957 (App. 24a), 2958.1 (App. 25a). In the praecipe, the plaintiff describes any property in which he believes the defendant may have an interest, including bank accounts or deposits, in which latter case he names the depository bank as garnishee. Pa. R.Civ.P. 2956.1 (App. 22a), 2957 (App. 24a), 3103 (App. 29a). The writ of execution commands the Sheriff, the officer who serves and enforces process for Pennsylvania's Courts of Common Pleas to seize any property of the defendant that plaintiff has described or, if a garnishee is named, to serve the writ upon the garnishee. Pa. R.Civ.P. 3103 (App. 29a), 3108 (App. 30a), 3111 (App. 31a). Service of the writ on a garnishee attaches all of the defendant's property that the garnishee then or thereafter possesses. Pa. R.Civ.P. 3111(b) (App. 32a). It restrains the garnishee from paying any sums to or on account of defendant until further order of the court or termination of the attachment, subject to punishment for contempt. Pa. R.Civ. P. 3111(c), (d) (App. 32a). The garnishee is required to promptly notify the debtor of the garnishment. Pa. R.Civ.P. 3140(a) (App. 34a).

Pennsylvania's remedy for relief from a confessed judgment is a petition to strike and/or open the judgment. Pa. R.Civ.P. 2959 (App. 27a). If the petition states *prima facie* grounds for relief, the court must issue a rule to show cause, fix a return date on the rule and thereafter dispose of the matter on petition and answer and any relevant evidence that can be obtained. Pa. R.Civ.P. 2959(b), (e) (App. 27a, 28a); *see Jordan* 20 F.3d at 1262 relying upon *Franklin Decorators, Inc. v. Kalson*, 431 A.2d 356 (Pa. Super. 1981).

Any judgment, lien or restraint on disposition of a defendant's property that result from entry of judgment by confes-

sion is preserved while the proceedings to strike or open the judgment are pending. Pa. R.Civ.P. 2959(f) (App. 28a). They are not affected by the filing of the petition or any rule to show cause issued pursuant to the petition absent an express stay of execution. During the course of any proceeding to strike or open a judgment, the court has no authority to dissolve the lien of the judgment unless the defendant posts security adequate to assure the judgment's payment. Pa. R.Civ.P. 2959(f) (App. 28a), 3143(b)(1) (App. 35a). Whether to stay execution until the petition to strike or open the judgment is decided is a matter for the court's discretion. *Jordan* 20 F.3d at 1262, relying upon *Continental Bank v. Frank*, 495 A.2d 565, 567 (Pa. Super. 1985). If the court refuses a discretionary stay of execution, a defendant may obtain one if he can secure a bond equal to the amount of the judgment plus probable interest and costs or make an equivalent cash deposit. Pa. R.Civ.P. 3121(b)(2) (App. 32a), 3143(b)(1) (App. 35a).

An order granting a petition to open leaves the judgment itself undisturbed. *See Jordan* 20 F.3d at 1263. It merely requires the plaintiff to prove his case in the usual way while the defendant is free to assert and prove any defenses he may have. Though the judgment is open, any lien it creates and any other restraint it imposes on the debtor's use of or access to its property is continuing until the case is finally determined against the plaintiff on its merits in accord with Pennsylvania's usual procedure for actions in assumpsit or an express contract. See Pa. R.Civ.P. 2959(f), comment (App. 29a).

If a judgment is opened, entry of a stay pending trial remains discretionary. Pa. R.Civ.P. 2959(e) (App. 28a); *see*

Jordan 20 F.3d at 1263 relying upon *Continental Bank*, 495 A.2d at 567. An order striking the judgment does annul the lien or any execution issued on it, but a judgment can be stricken only for defects that appear on the face of the record. *Jordan* 20 F.3d at 1263.

A defendant seeking to open or strike a judgment by confession must set forth all grounds for relief in a single petition, whether they are a basis for striking the judgment or opening it. Any grounds not included in the petition, whether to strike or to open, are waived. Pa. R.Civ.P. 2959(a), (c) (App. 27a). Many of the procedural details involved in a petition to open or strike are dependent on the local rules of the particular court of common pleas in which the petition is pending. *Jordan* 20 F.3d at 1263. If the petition and answer show the parties do not dispute any issues of material fact, the court of common pleas can dispose of the matter without hearing or fact finding, although briefs and legal argument may be required either by specific order or general rule. If the petition and answer indicate there are disputed facts, the parties can take written or oral depositions relating to them. When the depositions are completed, the case is submitted and the court makes findings resolving the disputed issues of fact and then grants or denies relief by applying the law to the facts it has found. Pa. R.Civ.P. 2959(e) (App. 28a), 2960.

Absent a discretionary stay of execution, a plaintiff executing on a judgment by confession may seize property that has been attached thirty days after the date the Prothonotary originally mailed notice of entry of the confessed judgment to the defendant. Seizure may take place upon the passage of thirty days even thought a petition to open or strike the

judgment is pending and even if the judgment has been opened. Pa. R.Civ.P. 2958.1 (App. 25a).

B. Proceedings Below

On August 17, 1998, Respondent Arsenal, Inc. d/b/a Arsenal Associates ("Arsenal") confessed judgment against Petitioner Glass Enterprises, Inc. ("Glass Enterprises") pursuant to a complaint in confession of judgment for money. Notice under Pa. R.Civ.P. 2958.1 of the judgment was received at the offices of Glass Enterprises on August 21, 1998. Glass Enterprises filed a petition to open and/or strike judgment (petition to open).

The Court entered a rule to show cause on October 2, 1998. In issuing the rule, the Court struck proposed language imposing a stay of execution.

Arsenal commenced garnishment proceedings against a bank account of Glass Enterprises at PNC Bank. A writ of execution and interrogatories to garnishee were filed on October 14, 1998. Funds at the bank were attached and set aside as "restricted". Those funds were sufficient to cover the judgment entered by confession.

The parties proceeded through discovery on the outstanding petition to open and the deposition of David Burg, president of Glass Enterprises, was taken November 18, 1998. On November 30, 1998, Arsenal filed a praecipe to enter judgment upon PNC Bank as garnishee. Counsel for Glass Enterprises was not served with a copy of the praecipe. Arsenal proceeded to collect upon the judgment against garnishee PNC Bank. On December 8, 1998, Arsenal filed two (2) documents with the prothonotary: an order to satisfy

judgment against garnishee, as well as a praecipe to mark judgment satisfied as to Glass Enterprises.

Argument on the outstanding petition to open was held on March 5, 1999. On March 5, 1999, the Court of Common Pleas entered its order denying the petition to open. The Court of Common Pleas did not rule on the merits of the petition to open finding that said petition was moot upon satisfaction of the judgment[2]. (App. 13a-14a). The Court of Common Pleas in its opinion ruled that satisfaction of the judgment could not be attacked absent fraud or mistake. (App. 14a).

Glass Enterprises timely appealed from the decision of the Court of Common Pleas to the Superior Court of Pennsylvania.[3] On April 20, 2000, the Superior Court of Pennsylvania affirmed the Court of Common Pleas reasoning that there was no fraud or mistake in the satisfaction of the judgment and that Arsenal was not prevented from moving forward

---

[2] The claim of mootness was not raised by Arsenal until the last permitted filing under the local rules of the Court of Common Pleas of Bucks County, Pennsylvania, in its response to the petition to open. Mootness and the effect of denial of a post seizure hearing were argued before the Court of Common Pleas in open court, without a record. The Court of Common Pleas did not address this issue in its opinion.

[3] Glass Enterprises argued before the Superior Court that it had been denied the due process requirement of a post seizure hearing relying upon *Jordan v. Berman*, 758 F. Supp. 269 (E.D. Pa. 1991), *affirmed in part, vacated in part* 20 F.3d 1250 (3d Cir. 1994) (App. 39a). The Superior Court did not address the issue in its opinion.

and seeking satisfaction of the judgment unless Glass Enterprises had requested and received a stay of proceedings (App. 7a). On May 2, 2000, Glass Enterprises filed a timely application for reargument before the Superior Court of Pennsylvania. On June 26, 2000, the Superior Court entered its order denying the application for reargument (App. 2a). On July 11, 2000, Glass Enterprises filed a timely petition for allowance of appeal to the Supreme Court of Pennsylvania.[4] On December 19, 2000, the Supreme Court of Pennsylvania entered its Order denying the petition for allowance of appeal (App. 1a).

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Superior Court Of Pennsylvania Is Erroneous And Conflicts With Relevant Decisions Of This Court.

The Superior Court of Pennsylvania has decided that where a petition to open judgment entered by confession is pending challenging the amount of the judgment confessed upon, a judgment creditor may appropriate the debtor's property through garnishment, have the judgment marked as satisfied, and thereby bar the debtor from his due process right to a hearing challenging the judgment. The decision of the Superior Court of Pennsylvania is erroneous and conflicts with relevant decisions of this Court.

---

[4] Glass Enterprises raised the denial of a post seizure due process hearing in its Petition for Allowance of Appeal to the Supreme Court of Pennsylvania (App. 38a).

The decisions of this Court teach us that pursuant to the Fourteenth Amendment of the Constitution of the United States, one is entitled to a hearing before being permanently deprived of property. Where only property rights are involved, a pre-judgment hearing is not necessary to comport with the requirements of due process, "... *if* the opportunity given for ultimate judicial determination of liability is adequate" *Mitchell v. W.T. Grant Company*, 416 U.S. 600, 611, 94 S. Ct. 1895, 1900, 40 L.Ed. 2d 406 (1974) (emphasis added). To comport with due process, any pre-judgment attachment procedure must provide an opportunity for a prompt post seizure hearing at which the propriety of the attachment can be tested. *North Georgia Fishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607, 95 S. Ct. 719, 722, 42 L.Ed. 2d 751 (1975).

Glass Enterprises was denied its post seizure hearing. This case presents the question of whether that denial is a violation of the requirements of due process set forth in the Fourteenth Amendment of the Constitution of the United States.

In the instant case, the amount owed by Glass Enterprises to Arsenal and which was confessed upon, was in dispute. Glass Enterprises filed a petition to open challenging the amount confessed upon. While the petition to open was pending, Glass Enterprises proceeded to unilaterally garnish funds of Arsenal in the possession of a bank at which Glass Enterprises had an account. Arsenal succeeded in obtaining the funds from the bank. After it obtained the funds from the bank, Arsenal unilaterally caused the judgments entered against Glass Enterprises and the bank as garnishee, to be marked "satisfied".

The Superior Court of Pennsylvania has held that a debtor may be denied a post seizure hearing on an outstanding petition to open judgment entered by confession where the creditor, through its unilateral acts, has seized funds, and thereafter had the judgments against the debtor and garnishee marked satisfied. The reasoning of the Superior Court is that by marking the judgments satisfied, the outstanding petition to open was rendered moot. This effect could only be saved by the entry of a discretionary stay.

Whether the debtor applies for or indeed obtains the stay has no relationship to his underlying claim to open the judgment, or his right to present evidence at a hearing to have the judgment opened. Whether the debtor obtains the stay, and maintains control of the funds, or does not, and chooses to risk reimbursement from the judgment creditor in the event it is successful, is its decision and totally unrelated to the debtor's opportunity to present evidence at a hearing.

Glass Enterprises asserts that it is entitled to its post seizure due process hearing, and if successful, the return of those sums of money upon which judgment by confession was inaccurate and improper. In *Di-Chem*, *supra*, this Court addressed procedures relating to the garnishment of a corporate bank account with due process considerations. This court in *Di-Chem* held Georgia procedures Constitutionally insufficient because (1) they allowed a writ of garnishment to issue on affidavit by a creditor or his attorney containing only conclusory allegations; (2) the writ was issuable by the court clerk without participation by a judge; (3) the garnishment could be dissolved only by the filing of a bond, which continued to deprive defendant of the use of some property; and (4) there was no provision for an early hearing at which

the creditor would be required to demonstrate at least probable cause for the garnishment. *Id.* 419 U.S. at 607, 95 S.Ct. 719.

The holding of the Superior Court does not comport with this fundamental due process requirement as noted in both *DiChem* and *Mitchell.* The right to seize funds does not mean the debtor is denied its due process right to a hearing as to the amount of the judgment with subsequent disgorgement and return of the funds if the factual basis upon which the judgment was entered is not true.

Where there has been a dispute as to the amount asserted, having a hearing and reaching the truth, should not and does not, depend on whether a stay is in place, or whether the funds have been seized, as here. An involuntary satisfaction of a judgment should not affect the right to bring error therefrom. Obtaining a discretionary stay of execution should not be a condition precedent to a due process hearing on a petition to open a judgment entered by confession[5].

II. The Question Presented Is Important.

Review of the decision of the Superior Court of Pennsylvania is important because the decision of the Superior Court presents a significant erosion of Constitutional provisions regarding commercial transactions which have not been significantly addressed by this Court since the decision in *DiChem, supra.*

---

[5] The decision as to whether or not to grant a stay may be made without an evidentiary hearing.

By this decision, Pennsylvania now makes the discretionary granting of a stay of execution the key to allow taking of property without a hearing.

The impact of the decision of the Superior Court will serve to deny significant due process rights to creditors throughout the Commonwealth of Pennsylvania, as well as those states which may have similar procedures. Since it is now possible, by unilateral action, to foreclose the opportunity for a constitutionally protected hearing.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL J. MCCANEY, JR., ESQ.
Counsel of Record
FLAMM, BOROFF & BACINE, P.C.
Attorneys for Petitioner
925 Harvest Drive, Suite 220
Blue Bell, PA 19422
(215) 239-6000

APPENDIX A – ORDER IN THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT, DATED DECEMBER 19, 2000

No.497 M.D. Allocatur Docket 2000

ARSENAL, INC. d/b/a ARSENAL ASSOCIATES,

Appellee

v.

GLASS ENTERPRISES, INC.,

Appellant

Petition for Allowance of Appeal from the Superior Court

ORDER

PER CURIAM:

AND NOW, this 19th day of December, 2000, the Petition for Allowance of Appeal is hereby DENIED.

APPENDIX B – ORDER IN THE SUPERIOR COURT OF PENNSYLVANIA, EASTERN DISTRICT, DATED JUNE 26, 2000

No.879 EDA 1999

ARSENAL, INC. d/b/a ARSENAL ASSOCIATES,

Appellee

v.

GLASS ENTERPRISES, INC.,

Appellant

ORDER

AND NOW, this 26TH of June, 2000, IT IS HEREBY ORDERED:

> THAT the application filed May 2, 2000, requesting reargument/reconsideration of the decision dated April 20, 2000 is DENIED.

PER CURIAM

APPENDIX C – MEMORANDUM IN THE SUPERIOR COURT OF PENNSYLVANIA, EASTERN DISTRICT, FILED APRIL 20, 2000

No.879 EDA 1999

ARSENAL, INC. d/b/a ARSENAL ASSOCIATES,

Appellee

v.

GLASS ENTERPRISES, INC.,

Appellant

Appeal from the Order entered March 5, 1999 in the Court of Common Pleas of Bucks County, Civil Division, at No. 98005590-23-1.

BEFORE: FORD ELLIOTT, STEVENS and ORIE MELVIN, JJ.

MEMORANDUM:

Appellant, Grass Enterprises ("Glass") seeks review of the trial court's Order denying its petition to Open and/or Strike Judgment entered by confession. For the following reasons, we affirm.

This litigation arose out of a routine landlord tenant dispute at the conclusion of a lease. Glass had entered Into a lease agreement as tenant of property owned by Arsenal Inc. ("Arsenal") located in the Arsenal Business Center. The premises were leased in "as is" condition. At the conclusion of the lease, Glass was to surrender the premises in its origi-

nal condition as of the commencement of the Lease. According to the terms of the lease agreement, Glass was responsible for repairs to maintain this condition, but not responsible for improvements to the premises. Arsenal contends that at the conclusion of the lease, Glass failed to make repairs necessary to restore the premises. Glass disputes this and alleges they made improvements to the property. When Glass failed to respond to Arsenal's demands for payment, Arsenal filed suit.

The conflict here arises from the legal procedure once Arsenal filed its complaint for confession of judgment. The trial court summarized what occurred as follows:

> On August 17, 1998, Plaintiff [Arsenal] confessed judgment against Defendant [Glass] for the sum of the amount of $52,850.53. Pursuant to Pa.R.Civ.P. 295-8.1, Notice was .served on Defendant [Glass] on August 21, 1998. Under Pa.R.Civ.P. 2959(a)(3), Defendant [Glass] was required to file a petition to open and/or strike the Judgment within 30 days of when Notice was served. Defendant [Glass] did not file its Petition until September 23, 1998, two days after the 30 day period had expired.
>
> After its Petition was filed, Defendant [Glass) failed to secure a stay of execution upon the Judgment. On October 14, 1998, a writ of execution was issued and PNC Bank was served with garnishment interrogatories. PNC Bank answered the garnishment interrogatories on November 12, 1998. On November 30, 1998, Plaintiff [Arsenal]

> entered judgment -for the amount admitted to be in PNC Bank's possession. The Judgment was marked satisfied on December 8, 1998 after Plaintiff [Arsenal] received payment from PNC Bank.

Trial Court's Opinion, 4/1/99, at 2.

Later, on March 5, 1999, the trial court denied the Petition to Open/and or Strike filed on behalf of Glass based on the fact that while the disposition of the Petition was pending, the judgment was marked satisfied. The trial court found satisfaction of the judgment rendered the petition to open or strike the judgment moot. Furthermore, the trial court points out that there was no stay of execution. Had there been a stay, Arsenal would not have been able to satisfy the judgment. Finally, the trial court addresses the question of whether the judgment would have been opened had the petition been timely filed.[1] The trial court concludes that, "[i]f however, the Petition were decided on the merits this Court

---

[1] Glass alleges the delay in filing the petition was the result of a misunderstanding between the secretary for counsel for Glass and the Prothonotary as to whether a filing fee was required. The secretary claims she was told by a clerk at the Prothonotary's office that no fee was required. She relied on this information and mailed the petition without a filing fee on Wednesday, September 15th (day 24). It was returned for lack of a filing fee on Monday, September 21st (day 30) when the law office was closed for the Jewish holiday Rosh Hashanah. The next day, immediately after the secretary found it in the mail, the petition was mailed again, this time with the filing fee. The petition was received in the Prothonotary's Office on September 23rd (day 32) and accepted for filing.

would have a basis for dismissing said petition." The trial court reasons that a finding that the alleged misunderstanding did not constitute a compelling reason for the untimely filing would well have been within the trial court's discretion.

Glass is now before this Court seeking review of the denial of the petition to open and/or strike. They frame the issues as follows:

1. WHERE A PETITION TO OPEN JUDGMENT ENTERED BY CONFESSION IS PENDING CHALLENGING THE AMOUNT OF THE JUDGMENT CONFESSED UPON, MAY A JUDGMENT CREDITOR APPROPRIATE THE DEBTOR'S" PROPERTY THROUGH GARNISHMENT/ HAVE THE JUDGMENT MARKED AS SATISFIED, AND THEN PRECLUDE THE DEBTOR FROM CHALLENGING THE JUDGMENT ON THE DEBTOR'S OUTSTANDING PETITION?

2. HAS A PETITION TO OPEN JUDGMENT BY CONFESSION BEEN FILED PROMPTLY WHERE IT WAS RECEIVED BY THE PROTHONOTARY WITHIN THIRTY (30) DAYS OF THE ENTRY OF SUCH JUDGMENT BUT WAS RETURNED FOR WANT OF A FILING FEE BECAUSE OF A MISUNDERSTANDING OF THE SECRETARY FOR COUNSEL FOR THE PETITIONER, AND WHERE THE PETITION WAS ACCEPTED FOR FILING THIRTYTWO (32) DAYS AFTER THE ENTRY OF JUDGMENT?

We first note our standard of review. When the denial of a petition to open a confessed judgment is appealed, we must determine if the trial court committed an error of law or a manifest abuse of discretion. *Iron Worker's S&L v. IWS, Inc.*, 622 A.2d 367, 370 (Pa. Super. 1993). Appellant claims the trial court erred in denying his Petition to Open. However the trial court has taken the position that this matter has been rendered moot by the satisfaction of the judgment. We agree.

> Generally, the payment of a judgment and entry of satisfaction discharges the judgment. Because the law contemplates an end to litigation, further proceedings may not commence upon a judgment which has been satisfied. Where a judgment has been satisfied, there no longer exists an obligation which may be opened or stricken, and all questions of liability and damages are deemed extinguished .

Wilk v. Kochara, 647 A.2d 595 (Pa. Super. 1994). As pointed out in *Wilk,* the only exceptions to this general rule are where satisfaction has been obtained through fraud or mistake. *Id.*

Wilk provides an example of fraud. In that case, while a petition to open or strike a confessed judgment filed on behalf of the judgment debtor Kochara was pending, the judgment creditor Wilk was successful in attaching moneys which were in the hands of a garnishee. *Id.* at 260. As a result of interrogatories, it was determined that Penn National Insurance Company possessed certain proceeds payable to the debtor as a result of an insurance settlement. The garnishee forwarded the proceeds to the creditor's counsel with a letter suggesting the money was being sent pursuant to an

understanding that the money would be held in escrow pending the outcome of the judgment debtor's petition to open or strike the judgment. The creditor Wilk denied such an agreement with the garnishee Penn National and used the proceeds to satisfy the judgment despite the debtor's allegation that no moneys were owed to the creditor. We held the debtor's averments that the satisfaction was obtained by fraud were sufficient to require a hearing. The issue was not rendered moot merely because the debtor was entitled to have the satisfaction stricken. "To hold otherwise would be to permit a judgment creditor to seize property of a debtor by unorthodox means and thereby prevent the alleged debtor from challenging either the judgment or the means of obtaining satisfaction thereof." *Id.* at 261-262. However, the fraud exception discussed in *Wilk* does not apply here. Arsenal did not obtain the satisfaction by fraud.

A judgment debtor may also be entitled to relief where there has been a mistake in satisfying a judgment. In *A-1 Discount v. Nardi,* 735 A.2d 121 (Pa. Super. 1999), the appellants' counsel mistakenly marked an entire judgment satisfied instead of releasing a lien arising under that judgment. The trial court denied a petition to strike the satisfaction. We held that where appellant's counsel inadvertently marked the entire judgment satisfied instead of merely releasing one lien arising under that judgment, it would be contrary to the principles of equity to allow the appellees to escape their obligation. Therefore, the satisfaction of the judgment was stricken because it was entered by mistake. In the present case, there was no mistake that caused the judgment to be marked satisfied. The only "mistake" Glass claims affected the timeliness of the petition. In attempting to satisfy the judgment, Arsenal

was successful in attaching Glass' monies that were in the hands of garnishee PNC Bank after a writ of execution was issued. While Glass alleges that they were denied the opportunity of seeking a stay pending disposition of their petition to open or strike, we can find no fraud or mistake in the satisfaction of the judgment.

Furthermore, Rule 2959(f) states, "[T]he lien of the judgment or of any levy or attachment shall be preserved while the proceedings to strike off or open the judgment are pending." Pa.R.C.P. 2959(f), 42 Pa.C.S.A. The Explanatory Notes that follow provides that the mere filing of a petition to open or strike does not affect execution, unless of course there is a stay. *Id.* Therefore, unless Glass requested a stay and it was granted, Arsenal was not prevented from moving forward and seeking satisfaction of the judgment. After a careful review of the petition to open or strike, we can find no averments in the petition to open or strike in which Glass seeks a stay.

Instead, they merely included language suggesting a stay be entered in their proposed Rule to Show Cause. When the trial court lined out the clause that a stay was granted Glass did not pursue the matter and allowed the proceedings to continue without a stay. While we acknowledge the harsh result that Glass is now precluded from a hearing on the matter, the rules do not provide for an automatic stay. Glass was obligated to seek a stay to protect its assets.

Finally, we note Glass makes much of their second issue of whether they, as the judgment debtor, should be excused from the untimeliness of his petition to open or strike the judgment. They claim the non-negligent conduct of the sec-

retary in sending the petition without a filing fee should be overlooked. While we are persuaded by Glass' argument that it would be an abuse of discretion to find this petition untimely under the circumstances, we must decline to reach the merits of this issue based on the fact that the judgment has been satisfied. Even if the untimeliness of the petition was excused, Glass never pursued a stay. In the words of *Wilk, supra,* "[T]here no longer exists an obligation which may be opened or stricken."

Order affirmed .

Judgment Entered.

_____

Prothonotary

Dated: _____

APPENDIX D – OPINION IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA CIVIL DIVISION, DATED MARCH 5, 1999

No. 98-05590-23-1

ARSENAL, INC. d/b/a ARSENAL ASSOCIATES

v.

GLASS ENTERPRISES, INC.

OPINION

Defendant appeals the Order of this Court dated March 5,1999, denying its Petition to Open and/or Strike Judgment Entered By Confession. Pursuant to Pa. R.A.P .1925(b), Defendant has submitted a concise statement of matters complained of on appeal. This opinion is filed in accordance with Pa.R.A.P. 1925(a).

Background

On November 12, 1987, Plaintiff, Arsenal, Inc., and Defendant, Glass Enterprises Inc., entered into a lease agreement for the premises known as Building 308 of the Arsenal Business Center. The lease agreement was extended pursuant to an addendum executed December 22, 1992. Under the lease agreement and the addendum, the leasehold expired February 28, 1998.

The premises were leased in "as is" condition. Under a provision of the lease agreement, Defendant was to surrender the premises to its condition as of the commencement of the

lease. Consequently, Defendant was responsible for making repairs to the premises to maintain its condition. However, Defendant was not responsible for making improvements to the premises.

When Defendant vacated the premises at the end of the lease, Plaintiff sent a Notice of Default alleging that Defendant failed-to make repairs to restore the premises. After Defendant failed to respond, Plaintiff brought suit. Whereas Plaintiff contended that it incurred substantial expenses to restore the leased premises to its former condition, Defendant argued that such expenses were incurred to make improvements to the leasehold.

On August 17, 1998, Plaintiff confessed judgment against Defendant for the sum of $52,850.53. Pursuant to Pa.R.Civ.P. 2958.1, Notice was served on Defendant on August 21, 1998. Under Pa.R.Civ.P. 2959(a)(3), Defendant was required to file a petition to open and/or strike the Judgment within 30 days of when Notice was served. Defendant did not file its Petition until September 23, 1998, two days after the 30 day period had expired.

After its Petition was filed, Defendant failed to secure a stay of execution upon the Judgment. On October 14,1998, a writ of execution was issued and PNC Bank was served with garnishment interrogatories. PNC Bank answered the garnishment interrogatories on November 12, 1998. On November 30, 1998, Plaintiff entered judgment for the amount admitted to be in PNC Bank's possession. The Judgment was marked satisfied on December 8, 1998 after Plaintiff received payment from PNC Bank.

Issues on Appeal

In the Statement of Matters Complained of on Appeal, Defendant asserts three points of error. First, it is alleged that, where a petition to open judgment entered by confession is pending, a judgment creditor may not appropriate the debtor's property through garnishment, have the judgment marked as satisfied and then preclude the debtor from challenging the judgment on the debtor's outstanding petition. Second, Defendant argues that where judgment has been entered by confession, a petition to open should be granted where the debtor has acted promptly, alleged a meritorious defense, and presented sufficient evidence of that defense to require submission of the issues to a jury. Third, Defendant contends that a petition to open judgment by confession has been filed promptly where it was received by the prothonotary within thirty days of the entry of such judgment but was returned for want of a filing fee because of a misunderstanding of the secretary for counsel for the petitioner and where the petition was accepted for filing thirty two days after entry of the judgment.

Discussion

1. **Absent fraud or mistake, a judgment that has been marked satisfied cannot be attacked by a petition to open and/or strike.**

Statutory and case law clearly provide that the Confessed Judgment is final because it has been marked satisfied and thus the present petition to open and/or strike judgment is moot. Pennsylvania statutory law expressly states that "a judgment creditor who has received satisfaction of any

judgment in any tribunal of this Commonwealth shall ...enter satisfaction in the office of the clerk of the court where such judgment is outstanding, which satisfaction shall forever discharge the judgment." 42 Pa.C.S.A. § 8104(a). Thus, the unambiguous language of the statute provides that a judgment that has been marked satisfied is a final judgment.

Further, the same conclusion can be reached under case law. It has been held that a judgment which has been satisfied no longer exists and cannot be attacked either by a motion to strike or by a motion to open. *Kalman v. Muzikar*, 304 Pa. Super. 503, 505, 450 A.2d 1025, 1026 (1982). Satisfaction of a judgment ordinarily extinguishes it and manifests expression of finality as to all questions of liability and damages, except where satisfaction was entered by fraud or mistake. *Linde Ent. v. Hazleton City Auth.*, 412 Pa.Super. 67,602 A.d 897,902 (1992). Thus, absent fraud or mistake, a judgment that has been marked satisfied cannot be attacked by a petition to open and/or strike judgment.

In the present case, while the disposition of Defendant's Petition was pending before this Court, Judgment was marked satisfied on December 8,1998. Once the Judgment was marked satisfied, the Defendant's Petition became moot. Additionally, Defendant has never alleged that Plaintiff used fraudulent means to satisfy the Judgment or that the Judgment was satisfied by mistake. Therefore, since the Judgment has been satisfied and there has been no allegation of fraud or mistake, Defendant's petition could not open and/or strike the Judgment and, consequently, was dismissed.

2. The mere filing of a petition to open and/or strike judgment does not stay execution on a confessed judgment.

Defendant argues that when a petition to open judgment entered by confession is pending, the judgment creditor cannot appropriate the debtor's property through garnishment, have the judgment marked as satisfied and then preclude the debtor from challenging the judgment on the debtor's outstanding petition. *See* Concise Statement of Matters Complained of on Appeal at ¶ I. However, that contention has no basis in the law. To the contrary, "the mere filing of a petition to open or strike does not affect the lien of the judgment *or of any execution,* subject, of course, to the power of the court to stay execution pending the decision on the petition." Pa.R.Civ.P. 2959 Explanatory Comment (1979) (*emphasis added*).

In the present case, Defendant filed its Petition to Open and/or Strike the Judgment after Plaintiff confessed judgment. However, Defendant never filed a petition to stay execution on the Judgment. Instead, Defendant, in the Rule to Show Cause, included language staying execution upon the Judgment. This Court struck that language as it was the improper procedural vehicle to stay execution. Because Defendant failed to follow proper procedure, it never secured a stay of execution. As a consequence, there were no impediments to Plaintiff executing on the confessed judgment. Plaintiff did lawfully and properly execute on the Judgment, and it was marked satisfied thereafter.

3. Defendant's Petition does not meet the requirements necessary to Open and/or Strike the Judgment.

Defendant argues that a judgment taken by confession will be opened, if the petition is timely filed, it alleges a meritorious defense and presents sufficient evidence of that defense to require the submission of the issues to a jury. *See* Concise Statement of Matters Complained of on Appeal at¶ II. Defendant correctly states the law. *See e.g., Rittenhouse v. Barclay White, Inc.*, 425 Pa.Super. 501, 506, 625 A.2d 1208, 1210 (1993). However, the decision on whether to open and/or strike the Judgment is moot because that Judgment has already been marked satisfied.

If, however, the Petition were decided on the merits, this Court would have a basis for dismissing said petition. One of the elements that must be satisfied in order for a petition to be opened is a timely filing. Under Pa.R.Civ.P. 2959(a)(3), a party has thirty days after being served with a notice of confessed judgment to file a petition to open and/or strike the judgment.

In the present case, Plaintiff confessed judgment against Defendant on August 17, 1998. Pursuant to Pa.R.Civ.P. 2958.1, Notice was served on Defendant on August 21, 1998. Defendant did not file its Petition until September 23, 1998, two days after the thirty day period had expired.

If a party does not file a petition to open and/or strike a confessed judgment within thirty days of being served with notice of the confessed judgment, that party must demonstrate compelling reasons for the delay or said petition will

be denied. Pa.R.Civ.P. 2959(a)(3). Defendant claims it had a compelling reason for the delay. It is alleged in Defendant's brief that the delay in filing was due to a misunderstanding between an employee at the prothonotary's office and a secretary of Defendant's counsel regarding filing fees.

The determination of what constitutes a compelling reason for the delay is a matter for the Court. If this Court considered Defendant's Petition on the merits, it would have had the authority to dismiss the Petition because of the untimely filing. A finding that the alleged misunderstanding did not constitute a compelling reason for the untimely filing would well have been within this Court's discretion.

It is for the above reasons that the Order of March 5, 1999 was entered.

BY THE COURT:

DATE:

_____

DANIEL J. LAWLER, J.

APPENDIX E – PENNSYLVANIA RULES OF CIVIL PROCEDURE

Rule 2951. Methods of Proceeding

(a)(1) Upon filing of the documents required by subparagraph (2), the prothonotary shall enter judgment by confession on a note, bond or other instrument confessing judgment or authorizing confession by an attorney at law or other person against the person who executed it in favor of the original holder or, unless expressly forbidden in the instrument, in favor of the assignee or other transferee without the agency of an attorney and without the filing of a complaint, for the amount which may appear to be due from the instrument. The judgment may include interest computable from the instrument.

(2) The documents to be filed in support of the entry of judgment are

(i) the instrument

(ii) an affidavit that the judgment is not being entered by confession against a natural person in connection with a consumer credit transaction, and

(iii) a certificate of residence of the plaintiff and of the defendant.

Note: Section 2737(3) of the Judicial Code provides that the prothonotary shall have the power and the duty to "enter all civil judgments, including judgments by confession."

* * *

(b) If judgment by confession is authorized by the instrument but may not be entered by the prothonotary under subdivision (a), an action shall be commenced by filing with the prothonotary a complaint substantially in the form provided by Rule 2952. Even though the instrument is one on which judgment could be entered by the prothonotary under subdivision (a), the plaintiff may proceed under this subdivision.

(c) The action must be brought under subdivision (b) if

(1) the instrument is more than ten years old or

(2) the original cannot be produced for filing or

(3) it requires the occurrence of a default or condition precedent before judgment may be entered, the occurrence of which cannot be ascertained from the instrument itself, or

(4) the computation of the amount due requires consideration of matters outside the instrument.

(d) If the instrument is more than twenty years old, judgment may be entered only by

leave of court after notice and the filing of a complaint under Subdivision (b).

(e) When the plaintiff proceeds under Subdivision (b) and the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature is not attached to the complaint, judgment may be entered only by leave of court after notice.

Note: The procedure for notice and hearing shall be in accordance with local practice.

Rule 2952. Complaint. Contents

(a) The complaint shall contain the following:

(1) the names and last known addresses of the parties;

* * *

(2) the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature; if the original is not attached, an averment that the copy attached is a true and correct reproduction of the original; if neither the original nor a reproduction can be attached, an explanation why they are not available;

* * *

(3) an averment that judgment is not being entered by confession against a natural person

in connection with a consumer credit transaction;

(4) a statement of any assignment of the instrument;

(5) either a statement that judgment has not been entered on the instrument in any jurisdiction or if it has been entered an identification of the proceedings;

* * *

(6) if the judgment may be entered only after a default or the occurrence of a condition precedent, an averment of the default or of the occurrence of the condition precedent;

(7) an itemized computation of the amount then due, based on matters outside the instrument if necessary , which may include interest and attorneys' fees authorized by the instrument;

(8) a demand for judgment as authorized by the warrant;

* * *

(9) if the instrument is more than twenty years old, or if the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature is not attached to the complaint, an application for a

court order granting leave to enter judgment after notice;

* * *

(10) signature and verification in accordance with the files relating to a civil action.

(b) The complaint shall neither contain a notice to defend nor be endorsed with a notice to plead, and no responsive pleading shall be required whether or not the complaint contains a notice to defend or is endorsed with a notice to plead.

Rule 2955. Confession and Judgment

(a) In an action commenced by a complaint under Rule 2951(b), the plaintiff shall file with the complaint a confession of judgment substantially in the form provided by Rule 2962.

(b) The attorney for the plaintiff may sign the confession as attorney for the defendant unless an Act of Assembly or the instrument provides otherwise.

Rule 2956. Entry of Judgment

The prothonotary shall enter judgment in conformity with the confession.

Rule 2956.1. Execution Upon a Judgment Entered by Confession

(a) Except as otherwise provided by subdivisions (b) and (c), a judgment entered by confession shall be enforced as provided by Rule 3101 et seq. governing the enforcement of a judgment for the payment of money.

(b) A judgment entered by confession which arises from a retail installment sale, contract or account under the Goods and Services Installment Sales Act or which constitutes a residential mortgage obligation under the Loan Interest and Protection Law shall be conformed as provided by Rule 2981 et seq. prior to execution.

* * *

(c) Execution upon a judgment entered by confession which is not within the scope of subdivision (b) and to which a petition to open or strike the judgment has not been filed, shall be

(1) commenced by a praecipe as provided by Rule 2957 and

* * *

(2) conditioned upon the service of notice on the defendant in the judgment as provided by either

(i) Rule 2958.1 at least thirty days prior to the filing of the praecipe for the writ of execution, or

(ii) Rule 2958.2 with the notice of sale of real property , or

(iii) Rule 2958.3 with the writ of execution.

Rule 2957. Praecipe for Writ of Execution. Amount. Items Claimed. Certification

(a) Plaintiff may include the amount due, interest, attorneys' fees and costs in the praecipe for a writ of execution under Rule 2963(5). Where judgment has been entered under Rule 2951(a) and there has been a record appearance of counsel at any stage of the proceedings and attorneys' fees are authorized in the instrument, these fees may be included in the praecipe for a writ of execution.

(b) The praecipe for the writ of execution shall contain the words "Confessed Judgment" immediately below the title of the praecipe and a certification that

(1) the praecipe is based upon a confessed judgment and

(2) the prothonotary is authorized to issue the praecipe because

(i) notice has been served pursuant to Rule 2958.1 as evidenced by a return of service filed of record, or

(ii) notice will be served pursuant to Rule 2958.2 because the property to

be levied upon consists solely of real property or real property and personal property to be sold with the real property pursuant to Section 9501(d) of the Uniform Commercial Code, or

(iii) notice will be served pursuant to Rule 2958.3 because the property to be levied upon consists of personal property or personal property and real property , not within the scope of Rule 2958.2(a)(2), or

(iv) notice was served in connection with a prior execution on this judgment and no further notice is required under Rule 2958.4(b), or

(v) a petition to open or strike the judgment has been previously filed and notice is not required under Rule 2956. 1 (c).

Rule 2958.1. Notice Served Prior to Execution

(a) A written notice substantially in the form prescribed by Rule 2964 shall be served on the defendant at least thirty days prior to the filing of the praecipe for a writ of execution.

* * *

Rule 2957 (b) governing the praecipe for the writ of execution requires a certification that notice has been given as provided by this role.

Rule 2959(a)(3) requires a petition for relief from a confessed judgment to be filed within thirty days after service of notice pursuant to this rule.

(b) The notice shall be served

(1) upon a defendant in the judgment who has not entered an appearance

(i) by the sheriff or by a competent adult in the manner prescribed by Rule 402(a) for the service of original process upon a defendant, or

* * *

(ii) by the plaintiff mailing a copy in the manner prescribed by Rule 403, or

(iii) pursuant to special order of court as prescribed by Rule 430 if service cannot be made as provided in subparagraphs (i) or (ii) , or

(2) upon a defendant in the judgment who has entered an appearance, by the plaintiff in the manner provided by Rule 440.

(c) The person serving the notice shall file a return of service as provided by Rule 405.

Rule 2959. Striking Off or Opening Judgment; Pleadings; Procedure

(a)(l) Relief from a judgment by confession shall be sought by petition. Except as provided in subparagraph (2), all grounds for relief whether to strike off the judgment or to open it must be asserted in a single petition. The petition may be filed in the county in which the judgment was originally entered, in any county to which the judgment has been transferred or in any other county in which the sheriff has received a writ of execution directed to the sheriff to enforce the judgment.

(2) The ground that the waiver of the due process rights of notice and hearing was not voluntary, intelligent and knowing shall be raised only

(i) in support of a further request for a stay of execution where the court has not stayed execution despite the timely filing of a petition for relief from the judgment and the presentation of prima facie evidence of a defense; and

(ii) as provided by Rule 2958.3 or Rule 2973.3.

(3) If written notice is served upon the petitioner pursuant to Rule 2956.1(c)(2) or Rule 2973. 1 (c), the petition shall be filed within thirty days after such service. Unless the defendant can demonstrate

that there were compelling reasons for the delay, a petition not timely filed shall be denied.

(b) If the petition states prima facie grounds for relief the court shall issue a rule to show cause and may grant a stay of proceedings. After being served with a copy of the petition the plaintiff shall file an answer on or before the return day of the role. The return day of the rule shall be fixed by the court by local rule or special order.

(c) A party waives all defenses and objections which are not included in the petition or answer .

(d) The petition and the rule to show cause and the answer shall be served as provided in Rule 440.

(e) The court shall dispose of the rule on petition and answer, and on any testimony, depositions, admissions and other evidence. The court for cause shown may stay proceedings on the petition insofar as it seeks to open the judgment pending disposition of the application to strike off the judgment. If evidence is produced which in a jury trial would require the issues to be submitted to the jury the court shall open the judgment.

(f) The lien of the judgment or of any levy or attachment shall be preserved while the proceedings to strike off or open the judgment are pending.

Excerpts from comment to rule 2959

New Rule 2959(f). An order of court opening a judgment does not impair the lien of the judgment or of any execution

issued on it, although the court may stay the execution pending final disposition of the of proceeding. 7 Stand.Pa.Prac. 172, 174 §§ 138, 142. To the contrary an order of court striking a judgment annuls of the lien of the judgment or of any execution issued on it. 7 Stand.Pa.Prac. 244 §§ 223, 224.

However, the mere filing of a petition to open or strike a judgment does not affect the lien of the judgment or of any execution, subject, of course, to the power of the court to stay execution pending decision on the petition. Subdivision (f) has been added to Rule 2959 to restate this principle.

Rule 3103. Commencement. Issuance

> (a) Execution shall be commenced by filing a praecipe for a writ of execution with the prothonotary of any county in which judgment has been entered. Except as otherwise prescribed by Rule 2963 governing a judgment entered by confession, the praecipe shall be in the form prescribed by Rule 3251.
>
> * * *
>
> (b) A writ issued by the prothonotary of the county in which judgment was entered originally or by transfer or certification from another court in the same county may be directed to the sheriff of ally county within the Commonwealth.
>
> * * *
>
> (c) When a judgment is transferred to another county , a writ issued by the prothonotary of the

transferee county may be directed only to the sheriff of his county .

(d) Writs may be issued at the same or different times or to the sheriffs of different counties without a prior return of any outstanding writ.

(e) Upon issuance of the writ the prothonotary shall transmit it directly to the sheriff to whom it is directed or upon plaintiff's request deliver it to the plaintiff or the plaintiff's representative for transmittal.

Rule 3108. Service of Writ. Notice of Execution

(a) Service of the writ shall be made by the sheriff in the case of

(1) tangible personal property, by levy thereon or, if the property is in possession of a third person. who prevents a levy or fails to make the property of the defendant available to the sheriff for levy, by serving the third person as garnishee;

(2) a lien upon real property created under a mortgage, judgment or otherwise, by serving as garnishee the mortgage, judgment or lien debtor, and the real owner of the real property upon which the mortgage, judgment or other lien is secured, as provided in Rule 3113;

(3) the interest of the defendant in a partnership, by serving the partnership as garnishee;

(4) other intangible personal property and rents, by serving a garnishee;

(5) real property of the defendant, title to which is recorded in the name of a third party, by levy and attachment as provided by Rule 3112;

(6) all other real property in the county , by noting upon the writ a brief description of the real property levied upon and a statement that the sheriff has levied upon the defendant's interest therein.

(b) Upon levy or attachment, the sheriff shall mail a copy of the writ to the execution defendant at the last known address. The plaintiff shall provide the sheriff with copies of the writ and envelopes for mailing properly stamped and addressed. The sheriff shall note in the return the mailing of the writ and the date thereof.

Rule 3111. Service of the Writ on Garnishee. Effect

(a) The writ shall be served by the sheriff upon the garnishee in the manner prescribed by Rule 402(a) except as otherwise provided by Rules 3112 and 3113. The sheriff shall furnish the garnishee with an additional copy of the writ for each defendant. If the garnishee served was not named in the writ he shall be added as a garnishee and return made accordingly.

(b) Service of the writ upon the garnishee shall attach all property of the defendant which may be attached under these rules which is in the possession of the garnishee. It shall also attach all property of the defendant which may be attached under these rules and which comes into the garnishee's possession thereafter until judgment against the garnishee even though no such property of the defendant was in the garnishee's possession at the time of service.

* * *

(c) Service of the writ upon the garnishee shall also subject the garnishee to the mandate and injunctive orders of the writ restraining the garnishee from paying any debt to or for the account of the defendant and from delivering any property of the defendant which may be attached under these roles to anyone except the sheriff or otherwise disposing thereof until further order of the court or discontinuance or termination of the attachment.

(d) Violation of the mandate and injunctive orders of the writ may be punished as a contempt.

Rule 3121. Stay of Execution. Setting Aside Execution

(a) Execution shall be stayed as to all or any part of the property of the defendant

(1) upon written direction of the plaintiff to the sheriff;

(2) upon the entry of bond with the prothonotary , by any person or party in interest, with security approved by the prothonotary , in the amount of plaintiff's judgment, including probable interest and costs, or in such lesser amount as the court may direct, naming the Commonwealth of Pennsylvania as obligee, and conditioned to pay the amount due within ninety (90) days of the entry of bond, unless the time for payment be further extended by the court;

(3) pending disposition of a property claim filed by a third party;

(4) upon a showing of exemption or immunity of property from execution;

(5) upon a showing of a right to a stay under the provisions of an Act of Congress or any Act of Assembly.

(b) Execution may be stayed by the court as to all or any part of the property of the defendant upon its own motion or

(1) a defect in the writ, levy or service; or

(2) any other legal or equitable ground therefor.

(c) In an order staying execution the court may impose such terms and conditions or limit the stay to such reasonable time as it may deem appropriate.

* * *

(d) The court may on application of any party in interest set aside the writ, service or levy

(1) for a defect therein;

(2) upon a showing of exemption or immunity of property from execution, or

(3) upon any other legal or equitable ground therefor.

(e) All objections by the defendant shall be raised at one time.

* * *

(f) After the termination of a stay, sale may be had without reissuance of the writ.

Rule 3140. Notice by Garnishee

(a) Upon being served with the writ, the garnishee shall promptly forward a copy to the defendant.

(b) Upon filing answers to interrogatories the garnishee shall promptly forward a copy to the defendant.

(c) A copy is forwarded within the requirement of this rule when it is delivered to the defendant by an adult at any place within or without the Commonwealth in the manner prescribed by Rule 402(a) for service of original process or when it is mailed

to the defendant by registered mail directed to the defendant's last known address.

Rule 3143. Dissolution of Attachment, Release of Property, Bond

(a) An attachment is not dissolved by the death or dissolution of a defendant or garnishee.

(b)(1) An attachment is dissolved when any person or party

(a) files with the prothonotary a bond with security approved by the prothonotary in the amount of plaintiff's judgment including probable interest and costs or in such lesser amount as the court may direct, naming the Commonwealth of Pennsylvania as obligee, conditioned to pay the plaintiff the amount finally determined to be due by the garnishee or the value of the property whichever is less, or

(b) deposits with the prothonotary or with the sheriff for the prothonotary to be held by the prothonotary or the sheriff upon the same condition as the bond security in the form of legal tender of the United States in an amount equal to the plaintiff's judgment including probable interest and costs or in such lesser amount as the court may direct.

(2) Upon the filing of the bond or security, the garnishee shall be discharged

> from further liability for payment under the attachment but the attachment shall be prosecuted to final judgment for the purpose of determining the amount if any due by the garnishee to the defendant or the value of the property attached.

(c) Specific property is released without dissolving the attachment when any person or party gives bond or security as provided by Subdivision (b) of this rule in an amount based upon the value of the property to be determined by the court and conditioned to pay the plaintiff the amount of the final judgment against the defendant or the value of the property released, whichever is less.

* * *

(d) The court on petition of any party may at any time after notice and hearing release part of the attached property if the value of the property attached is excessive compared to the amount in controversy.

(e) If the attachment is dissolved or property is released the property shall be returned to the person from whom it was taken.

(f) The prothonotary, on praecipe of the garnishee or defendant shall enter a rule on the plaintiff to file interrogatories. If the plaintiff fails to comply with the rule within twenty days after service the prothonotary upon praecipe of the garnishee shall

enter judgment of non pros against the plaintiff and in favor of the garnishee which shall dissolve the attachment as to the garnishee.

(g) At any time after the filing of answers to the interrogatories and service of a copy upon the plaintiff the prothonotary on praecipe of the garnishee shall enter a rule on the plaintiff to (1) seek judgment against the garnishee under Rule 3146(b) or (2) place the issue between the plaintiff and garnishee upon the list for trial. If the plaintiff fails to comply with the rule within twenty days after service the prothonotary on praecipe of the garnishee shall enter judgment of non pros against the plaintiff in favor of the garnishee which shall dissolve the attachment as to the garnishee.

(h) The court on petition of any party may, at any time after notice and hearing dissolve the attachment if the plaintiff has not prosecuted it with diligence.

APPENDIX F – EXCERPTS FROM PETITION FOR ALLOWANCE OF APPEAL TO THE SUPREME COURT OF PENNSYLVANIA, FILED JULY 14, 2000

* * *

The decision of the Superior Court operates to require a stay of execution to be in place for a judgment debtor to be afforded its due process rights for a hearing before it is permanently deprived of property. (*See, Jordan v. Berman*, 758 F. Supp. 269, 278 (E.D. Pa. 1991) and Pa. R.C.P. 2959 designed to provide due process on issues challenging the propriety of judgment entered by confession.) According to *Guthrie* that is not the law of this Commonwealth, nor should it be.

* * *

The Superior Court has made the obtaining of a stay of execution a condition precedent to a due process hearing on a petition to open a confessed judgment. This deprivation of rights must be ruled upon by our highest court.

* * *

APPENDIX G – EXCERPTS FROM BRIEF FOR APPELLANT BEFORE THE SUPERIOR COURT OF PENNSYLVANIA, FILED MAY 14, 1999

* * *

A person is Constitutionally entitled to a hearing before he is permanently deprived of property. *Jordan v. Berman*, 758 F.Supp. 269, 278 (E.D.Pa. 1991), relying upon *Mithcell v. W.T. Grant Company*, 416 U.S. 600, 611, 94 S.Ct. 1895, 1902, 40 L.Ed.2d 406 (1974). While constitutional requirements for due process allow prejudgment attachment, there must be an opportunity for a prompt post seizure hearing. *Jordan* at 758 F.Supp. 279-280.

* * *

Permitting a creditor holding a judgment entered by confession to render an outstanding petition to open moot based upon the seizure of funds through garnishment runs contrary to the standards set forth in the Rules of Civil Procedure governing opening of confessed judgments, and is contrary to the due process requirements of the Constitution of the United States. A judgment debtor by confession is denied the opportunity of a hearing by the unilateral acts of the judgment creditor .

* * *